

1994

## ...Or Would You Rather Have What's behind Door Number Two - Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk

Robert J. Witte

Follow this and additional works at: <https://scholar.smu.edu/jalc>

---

### Recommended Citation

Robert J. Witte, *...Or Would You Rather Have What's behind Door Number Two - Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk*, 59 J. AIR L. & COM. 617 (1994)  
<https://scholar.smu.edu/jalc/vol59/iss3/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**...OR WOULD YOU RATHER HAVE WHAT'S  
BEHIND DOOR NUMBER TWO? UNIFORM  
CHOICE OF LAW PROPOSALS: BIG DEAL  
OF THE DAY OR JUST ANOTHER  
ZONK?**

ROBERT J. WITTE\*

**P**ICTURE THE golden age of the television game show. A couple in their mid-thirties dresses up as chickens for the entire national television audience to see. Monty Hall, the host of "Let's Make a Deal"<sup>1</sup> has just given them \$100, much to their fowlish delight. Then, however, Monty offers the chance to give back their cash in exchange for what's behind "Door Number Two." It's now decision time — behind that door could be a trip, more money, a new car or another glamorous prize. However, there could also be a "zonk" awaiting them — an old goat, an oversized baby buggy, or quite appropriately, a bucket of chicken. The contestant's option is between a sure thing and the unknown.

---

\* B.A. University of Oklahoma, J.D. Southern Methodist University. Associate, Winstead Sechrest & Minick P.C., Dallas, Texas. The author expresses his gratitude to Elizabeth G. Thornburg, Associate Professor of Law, Southern Methodist University, for her advice and direction in the preparation of this article.

<sup>1</sup> "Let's Make a Deal" was an award-winning game show that ran for 4,500 episodes from 1963 - 1986 (NBC 1963 - 1968; ABC 1968 - 1976; syndication 1971 - 1976, 1980 - 1982, 1984 - 1986) and featured Monty Hall as host and Jay Stewart as announcer. On the show, contestants dressed in outrageous outfits were given an initial prize, and then asked whether they wanted to "deal" away that prize for some unknown treasure either in a box or behind door number one, two or three. At times, something valuable would be waiting, while some contestants traded for prizes of no real value, called "zonks." Some contestants chose the safe way out, settling for a known quantity. Others were more daring.

Although most practitioners or scholars would not likely equate the current state of choice of law to the \$100 held by a couple of human chickens, current choice of law at least represents a sure thing. Despite its drawbacks, the current system's strengths and weaknesses are for the most part well known. For over thirty years, however, various commentators have proposed that choice of law be federalized, or at least made uniform among states.<sup>2</sup> Some articles have called for an all-encompassing uniform choice of law standard,<sup>3</sup> while others have recommended that action be taken only in specific areas, such as "mass tort" litigation.<sup>4</sup> In response, some scholars argue that such proposals would not avoid the dilemmas posed by the current system. These commentators instead suggest that federalizing choice of law would be an affront to state sovereignty and that a new uniform provision would result in an immense amount of unneeded litigation.<sup>5</sup> All

---

<sup>2</sup> See, e.g., Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L. REV. 1191 (1967); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

<sup>3</sup> See, e.g., sources cited *supra* note 2.

<sup>4</sup> In the past few years, dozens of articles, comments and notes have discussed the need for some type of uniform federal standard to govern both substantive law and choice of law in mass-tort litigation. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View From the Legislature*, 73 MARQ. L. REV. 535 (1990); Linda S. Mullenix, *Federalizing Choice of Law For Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992); Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule For New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass Tort Cases*, 71 TEX. L. REV. 1 (1992); Symposium, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129 (1989); William D. Torchiana, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913 (1986); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715 (1992); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising From Disasters*, 5 TOURO L. REV. 1 (1988); Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1986); Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457 (1989).

<sup>5</sup> See Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 95 (1989).

sides do agree that no one can predict with certainty the repercussions which would follow such change.

Part I of this paper will describe the current choice of law system, highlighting its strengths and weaknesses. Part II will outline some of the proposals to bring uniformity to choice of law, both on an overall and piecemeal basis. Part III will describe some current political realities which will keep any changes from taking place in the near future, and possibly for a long time to come. This article concludes that despite the frustration experienced by practitioners and although a number of well envisioned proposals to simplify choice of law are on the table, reality dictates that we will not see a uniform choice of law system for a long time, if ever. The "chickens" just are not willing to take the risk.

# I. THE CURRENT CHOICE OF LAW SYSTEM: MONEY IN THE HAND — IS IT ENOUGH, OR SHOULD WE MAKE A BETTER DEAL?

Choice of law questions arise when a dispute falls under state law and involves persons, parties, or transactions connected to more than one state.<sup>6</sup> When the law applicable to the dispute differs between the states (thus leading to a potentially different result depending upon which law applies), a choice of law rule guides<sup>7</sup> the court in determining which state law to apply. Such situations occur most frequently in tort cases (including airline disasters),<sup>8</sup> but are also quite common in contracts and internal cor-

---

<sup>6</sup> ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 1-12 (1987).

<sup>7</sup> Although the various choice of law provisions appear to simply guide the courts toward selecting the proper applicable law, they often allow the court to manipulate various factors and considerations in order to produce a "favorable" result.

<sup>8</sup> *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333 (D.D.C. 1983); *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1-2 (1991); Ross D. Cooper, Com-

porate affairs.<sup>9</sup> As society has shifted its focus from intra-state to interstate commerce and activity, the number of potential choice of law situations has skyrocketed. Recently, Michael H. Gottesman stated:

In the modern era, virtually every American engages in hundreds of transactions a day with the potential to trigger a lawsuit requiring a choice between multiple states' laws: every product used that was made out-of-state, every

---

ment, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 GEO. WASH. L. REV. 1145 (1989).

A frequently studied choice of law exercise illustrates the problems which can arise in an airline situation. Consider the following:

(1) On February 1, 1975, a cook in Alaska handled ham to be served aboard the flight. The cook had blisters infected with staphylococcus. The ham was kept at room temperature for six hours during preparation.

(2) In Tokyo, 343 passengers boarded the flight. While the plane was flying toward Anchorage for refueling, the food trays were stored at 50 degrees overnight. Staphylococcus multiplies at temperatures above 40 degrees and produces a toxin that causes food poisoning.

(3) The trays were loaded at Anchorage, and the plane took off for Copenhagen, its next stop.

(4) The trays were heated in a 300 degree oven for fifteen minutes, a treatment that will not destroy the toxin, and the passengers were served. Those who ate contaminated food began to experience the symptoms of food poisoning as the plane approached Copenhagen.

(5) In Copenhagen, 144 passengers disembarked ill. The rest flew on to Paris. Another 51 of these later became ill.

A series of choice-of-law problems are then posited with regard to a passenger who (a) arranged a tour of Japan by telephone from Michigan through American Express in New York, and left from Detroit Metropolitan Airport for Japan, (b) arranged while in Tokyo, through the American Express office there, to take a different flight and include Europe in the passenger's travels, (c) boarded in Tokyo, (d) ate the contaminated food, which was loaded in Anchorage, while flying over Canada, (e) landed in Copenhagen, where the passenger began to feel ill but refused medical attention, and (f) continued on to Paris, where the passenger became violently ill and died.

JAMES A. MARTIN, *CONFLICT OF LAWS, CASES AND MATERIALS* 38-39 (2d ed. 1984), as cited in Mullenix, *supra* note 4, at 1642.

<sup>9</sup> Gottesman, *supra* note 8, at 1-2. In discussing the broadness of the scope of choice of law, Larry Kramer remarked that choice of law is not "limited to car accidents and slip-and-fall cases. . . . [but] also concerns marriage, divorce, child custody, abortion, criminal law, welfare, education, and innumerable other matters. . . . [It] defines the scope of the whole corpus of a state's law, and in this way it defines the scope of the community itself." Larry Kramer, *On the Need For A Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2136 (1991).

out-of-state motorist passed on the highway, every activity undertaken while visiting another state, and so forth.<sup>10</sup>

The escalation in actual and potential choice of law cases seems to have brought the current choice of law system under increased scrutiny.

Choice of law issues have long been treated by the Supreme Court as matters of state law, a view initially fueled by Justice Story<sup>11</sup> and Justice Brandeis.<sup>12</sup> Justice Brandeis, twenty-two years prior to his famous opinion in *Erie R.R. Co. v. Tompkins*,<sup>13</sup> held in *Kryger v. Wilson*<sup>14</sup> that choice of law questions were a matter of local common law.<sup>15</sup> There are, however, many who disagree with this

---

<sup>10</sup> Gottesman, *supra* note 8, at 1.

<sup>11</sup> See Trautman, *supra* note 4, at 1716-17. Trautman discusses the influence of Dutch theory on Justice Story, stating that he "analogized the states to European nations." *Id.* Story is described as having a "predilection for national authority," but Trautman says that two of his decisions, *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819) (holding that home port liens are governed by state law) and *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) (denying federal admiralty law jurisdiction over a suit for wages earned on a river-traveling vessel), seemed to favor state authority. Trautman states that Justice Story "was the first of many great judges to contribute to [the] unfortunate view [that choice of law should be treated as a matter of state law] . . . perhaps his views on admiralty jurisdiction . . . and on diversity jurisdiction blinded him to the true nature of this problem." *Id.* at 1716; see also Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 258-62 (discussing influence of Dutch and Continental Theory on Justice Story's conflicts jurisprudence).

<sup>12</sup> Trautman, *supra* note 4, at 1716-17.

<sup>13</sup> 304 U.S. 64 (1938).

<sup>14</sup> 242 U.S. 171 (1916). In *Kryger* a dispute arose between the purchaser and the vendor of a piece of land in North Dakota which led to an action to quiet title. Under North Dakota (forum and location of property) law, the purchaser's contract to acquire the land was effectively canceled; whereas under Minnesota (place of contracting and performance) law, the purchase contract remained enforceable. Upholding the North Dakota court's decision to apply its own law in favor of the vendor, Justice Brandeis declared:

The most that the [vendee] can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancel[li]ation [sic] of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned.

*Id.* at 176 (emphasis added), as quoted in Trautman, *supra* note 4, at 1717. Trautman believes that the "demands of justice in multistate transactions call for further significant encroachments on Justice Brandeis' *Kryger* view." *Id.* at 1718.

<sup>15</sup> *Id.* at 1716.

treatment, and who argue that choice of law should be a federal matter because the interests of two or more states are involved.<sup>16</sup> Professor Henry M. Hart, Jr., in arguing the federal nature of choice of law, went so far as to quote a passage from *The Federalist Papers*, in which Alexander Hamilton argues that "cases in which 'one State or its citizens are opposed to another State or its citizens' should be heard in national courts, in order to assure even-handedness and to avoid bias."<sup>17</sup> Although none of the proponents argue that such cases should be heard exclusively in national courts, they do yearn for federal standards. The proponents claim that federal standards would offer an escape from a situation in which:

the substantive laws of the various states have grown more divergent; the choice of law rules the state courts have applied in the absence of federal command have become chaotic producers of waste and unfairness; and the Supreme Court's relaxation of the Constitutional constraints on state court jurisdiction and state court application of forum law have intensified the forum shopping and forum-preference in selection of law that lie at the heart of the present problem.<sup>18</sup>

Other commentators do not advocate federal action but argue for uniformity in choice of law through either a new Restatement, a Uniform Choice of Law Code (similar in format to the Uniform Commercial Code), or a set of Multistate Canons of Construction, any of which could be adopted by the states themselves.<sup>19</sup>

Since choice of law is presently treated as a matter of state law, each of the fifty states has its own choice of law

---

<sup>16</sup> See, e.g., Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105 (Spring 1977); Baxter, *supra* note 2, at 73; Hart, *supra* note 2, at 539-42; Horowitz, *supra* note 2, at 1193-94.

<sup>17</sup> THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961) quoted from Hart, *supra* note 2, at 514. Hart, discussing federal diversity jurisdiction, professed, "[t]he questions are essentially federal, in the sense that they involve . . . more than one state." Hart, *supra* note 2, at 514.

<sup>18</sup> Gottesman, *supra* note 8, at 2.

<sup>19</sup> See *infra* notes 67-98 and accompanying text.

provision. These provisions fall into certain categories which are briefly described below.

1. The *First Restatement*,<sup>20</sup> published in 1934, is based on Joseph Beale's "vested rights" doctrine that a legal right "vests" only when the last event takes place which is necessary to give rise to that right, and that the law applicable to a specific dispute should be that of the jurisdiction where that "last event" took place.<sup>21</sup> The *First Restatement* therefore identifies both the "vesting event" and the proper jurisdiction (e.g., place of contracting) for a number of different legal categories (e.g., contracts), and recommends that the court apply the law of that jurisdiction without scrutinizing the substance of that particular law.<sup>22</sup>

2. The *Second Restatement*,<sup>23</sup> released in 1971, sought to work some flexibility into the *First Restatement* framework by turning its territorial rules into initial presumptions, which would be weighed along with other factors, including the interests of the various states, to choose the law of the jurisdiction with the "most significant contacts to the controversy."<sup>24</sup> Although the *Second Restatement* does specify a number of relevant guiding factors,<sup>25</sup> it does not

---

<sup>20</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934) [hereinafter referred to as RESTATEMENT (FIRST)].

<sup>21</sup> Reavley & Wesevich, *supra* note 4, at 9-10; see 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 73, at 1967-70 (1935); see also LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS § 1.2, at 18-22 (1991) (summarizing Beale's vested rights theory).

<sup>22</sup> RESTATEMENT (FIRST) §§ 311-40, 377, 384.

<sup>23</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT (SECOND)].

<sup>24</sup> Reavley & Wesevich, *supra* note 4, at 14.

<sup>25</sup> Among the "factors relevant to the choice of the applicable rule of law" listed in Section 6 of the *Second Restatement* are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.



state any relative weight they should be given by the court in making its determination.<sup>26</sup>

3. Brainerd Currie's "Interest Analysis" is based on the underlying premise that when states' laws conflict, it is state interests, and not individual rights, that are of concern.<sup>27</sup> Currie felt that a particular law did not need to be applied unless doing so would further the policy behind the creation of that law.<sup>28</sup> He argued that the court should analyze these state interests by first looking at the rationale behind the legal standard of each state, and then examining the various contacts of the parties to each state.<sup>29</sup> In some situations, called "false conflicts", only one state would be interested in having its law govern, and that law would apply.<sup>30</sup> In "true conflict" scenarios,

RESTATEMENT (SECOND) § 6.

<sup>26</sup> Michael Gottesman described the *Second Restatement* as a "hodgepodge of all theories" and stated that the court's mission under this provision is to "compare apples, oranges, umbrellas, and pandas, and determine which state's law to apply by the relative importance assigned to these factors." Gottesman, *supra* note 8, at 8. Gottesman does not seem to approve of the *Second Restatement*. He asserts:

The supposed virtue of the *Second Restatement* was the freedom it provided courts to weigh all conceivably relevant factors and then tailor the choice of law to the circumstances of the case. That very flexibility was, however, equally its vice: courts could arrive at any outcome applying its factors, and no one could predict in advance what state's law governed their actions. The problem was not merely that courts were afforded the opportunity to be manipulative; the problem was that even a court without such desire could find in the *Second Restatement* no guidance as to how it was to decide a case after identifying the factors in play.

*Id.* Lea Brilmayer compares the *Second Restatement* to the comedian's definition of a camel: "a horse drafted by a committee." BRILMAYER, *supra* note 21, at 68. The general consensus of the critics is that the *Second Restatement* is too vague to be of any help. However, this generality does give judges the flexibility to make proper decisions without being constrained by an uncompromising choice of law provision.

<sup>27</sup> Reavley & Wesevich, *supra* note 4, at 11-12.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12; see Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963) (hereinafter SELECTED ESSAYS). It is interesting that Currie wrote: "We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious." *Id.*

<sup>30</sup> *Id.*

the court should apply forum law.<sup>31</sup> In certain "unprovided for" cases, where neither state would have an interest in applying its own law, the law of the forum would be applied.<sup>32</sup>

4. Robert Leflar's "Better Law" doctrine branches off of Currie's interest analysis. Leflar argued that in "true conflicts" cases, the court should choose what it perceives to be the "better law."<sup>33</sup>

5. William Baxter's "Comparative Impairment" doctrine is yet another offshoot of Currie's interest analysis. Baxter believed that under "true conflict" circumstances, the court should select the law of the state whose interests would be hurt the most if not selected.<sup>34</sup>

One recent survey shows that fourteen states still apply the territorial rules of the *First Restatement*, twenty-three follow the "smorgasbord" approach of the *Second Restatement*, six employ some type of Currie's interest analysis, four use Leflar's "better law" approach, two presume that forum law applies, and one (California) adopts Baxter's comparative impairment variant of Currie's interest analysis.<sup>35</sup> Although this lack of uniformity seems mind boggling on its own, it is just the tip of the iceberg. Not all states which use the same test do so in the same manner. For example, of the twenty-three states that follow the *Second Restatement* approach, each state (and each court within that state) is free to give as much weight to each individual factor as it sees fit.<sup>36</sup> In addition, some states may fluctuate between approaches depending on which will achieve

---

<sup>31</sup> *Id.*

<sup>32</sup> Gottesman, *supra* note 8, at 6. This could be the case if the law of the plaintiff's domicile supported the defendant, and the law of the defendant's domicile would be beneficial to the plaintiff.

<sup>33</sup> Robert A. Leflar, *Conflicts Law: More Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-88 (1966).

<sup>34</sup> Baxter, *supra* note 2, at 42.

<sup>35</sup> Reavley & Wesevich, *supra* note 4, at 16. Lea Brilmayer mentions that any such survey should be regarded merely as suggestive, as courts in the various jurisdictions "are not always consistent or perfectly coherent." Brilmayer, *supra* note 21, at 68.

<sup>36</sup> Reavley & Wesevich, *supra* note 4, at 17.

an "equitable" result in the case before them.<sup>37</sup> The result is a system in which the choice of law regime of most states is "either inherently indeterminate or subject to so many exceptions as to make it indeterminate as applied."<sup>38</sup>

Both practitioners and scholars have bemoaned the current state of choice of law.<sup>39</sup> As early as 1953, William Prosser stated that "the realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon . . . the ordinary court, or lawyer, is quite lost when engulfed and entangled in it."<sup>40</sup> Critics claim that

---

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 70, at 207-11 (1984) (discussing the system's lack of a theoretical foundation, which causes the courts to often appear biased); Lea Brilmayer, *Picking and Choosing: Time For a Change in Modern Choice of Law Theory?* 4 BENCHMARK 45 (1988) (noting the twist of irony in the fact that choice of law, a legal field which has been at times overwhelmed by academic commentary, is nonetheless one of the most confusing); Gottesman, *supra* note 8, at 11-12 & n.42 (citing ten choice of law scholars criticizing the current system); P. John Kozyris, *Forward to the Symposium on Interest Analysis in Conflict of Laws*, 46 OHIO ST. L.J. 457, 458 (1985) (claiming that "[t]he conflicts misery index, which is the ratio of problems to solutions, or of verbiage to result, is now higher than ever"); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 344 (1990) (stating that the courts have "failed . . . due mostly to the conceptual fog that has enshrouded choice of law with the misguided goal of finding a neutral theory of 'conflicts justice'," and asserting that "[i]t is time to abandon this fruitless venture and frankly recognize that choice of law requires accommodating the equally legitimate claims of different states to govern"); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 770 (1987) (claiming that certainty in the field of conflict of laws is as good as dead); Reavley & Wesevich, *supra* note 4, at 17 (calling the system a "colossal jurisprudential failure"); Kastenmeier & Geyh, *supra* note 4, at 542 (stating that trying to figure out the current system is often as frustrating as "trying to tattoo soap bubbles").

<sup>40</sup> Gottesman, *supra* note 8, at 1 (citing William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953)). Gottesman humorously notes that "agricultural metaphors have liberally fertilized the conflicts literature." *Id.* at 2 & n.5; see also WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) (calling for the "removal of weeds from the intellectual garden"); Robert A. Leflar, *Choice of Law: A Well Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977) ("well-watered plateau"); David F. Cavers, Book Review, 56 HARV. L. REV. 1170, 1172-73 (1943) (referring to Cook's lack of solutions, stating "all our gardeners are weeders and none planters").

not only is the existing structure confusing, but that it also fosters unpredictability, yields nonuniform and inconsistent outcomes, encourages forum-shopping, wastes time and judicial resources, and allows states to protect their own parochial interests at all cost.

*Unpredictability:* Because each state has essentially its own approach to choice of law, the system often produces unpredictable outcomes. Currently, parties do not know what laws govern their conduct until they are called into court (which most do not expect to occur in the first place). This lack of certainty can eventually have the negative effect of discouraging beneficial interstate activity.<sup>41</sup> Although some states allow parties to specify which law would regulate any dispute between them, the choice of law rules of some states do not. In addition, this option is obviously not available in nonconsensual transactions.<sup>42</sup>

Another factor which gives rise to unpredictability is a lack of understanding of choice of law rules by attorneys, clerks, and judges. Patrick E. Bradley, a trial attorney with the Aviation and Admiralty Division of the United States Department of Justice (Civil Division, Torts Branch), has dealt with conflicts issues for eight years. Using interest analysis as an example, Bradley states, "it is frequently the case that the courts don't understand I.A. and neither do the lawyers. Instead, a judge in an interest analysis jurisdiction will frequently speak of the 'contacts' of the various parties, and apply the law which the judge feels produces the most favorable result."<sup>43</sup> As a result, the difference between success and failure in the courtroom

---

<sup>41</sup> Kramer, *supra* note 9, at 2137. Kramer adds that "because (the discouragement of desirable interstate activity) is bad for all states, all states should have an interest in devising a choice of law system that provides predictable, uniform treatment of multistate cases." *Id.*

<sup>42</sup> *Id.* at 2137 & n.10.

<sup>43</sup> Interview with Patrick E. Bradley, Trial Attorney in the Aviation/Admiralty Division of the United States Department of Justice (Civil Division, Torts Branch), in Washington, D.C. (Mar. 19, 1993, and follow-up Dec. 14, 1993) (hereinafter referred to as Bradley interview) (statements attributed to Mr. Bradley throughout this article are based on his own personal opinion and do not in any way reflect an official stance of the United States Department of Justice).

could depend on how a particular judge feels on any given day.

*Lack of Uniformity/Inconsistency of Results:* It makes sense that a system which is attacked for being unpredictable would also be assailed for producing nonuniform, inconsistent results. Ours is a structure in which three passengers could be sitting beside one another in an airplane that crashes, killing all three. If the three are domiciled in different states, it is possible that in one case, the airline could be found negligent and required to pay the family of passenger number one full compensation. In the case of passenger number two, the airline could be found negligent and ordered to pay only \$50,000 (or amount allowed by the particular state statute limiting damages). Alternatively, the airline could be found free of negligence with the family of passenger number three footing the litigation costs. The inconsistent treatment of these families is unfair, an opinion echoed by practitioners and academics alike.<sup>44</sup> For example, Professors Robert Sedler and Aaron Twerski state the problem of inconsistency by stating: "[A]s long as there can be multiple litigation in different states on the same underlying claim, there is also the possibility of 'inconsistent results' due to different dispositions. Juries in different states, operating under the same applicable law, may resolve questions of fact and liability differently."<sup>45</sup>

*Forum shopping:* In cases where the incident or transaction that gives rise to the dispute has contacts with more than one state, the plaintiff often has the opportunity to select the state in which to file the lawsuit. Critics complain that this allows plaintiffs to "forum-shop," choosing the jurisdiction with the most favorable substantive law and choice of law provisions. This opportunity is not,

---

<sup>44</sup> See, e.g., Kastenmeier & Geyh, *supra* note 4, at 551-52 (arguing that "fundamental fairness" is not achieved in this situation); Reavley & Wesevich, *supra* note 4, at 23-24 (arguing that "fairness demands that parties to cases concerning identical facts be treated equally under the law").

<sup>45</sup> Kastenmeier & Geyh, *supra* note 4, at 551 (quoting Sedler & Twerski, *supra* note 5).

however, available to defendants. It is argued that this practice of interstate forum shopping has resulted from a series of independent decisions, including:

(the decision) of state governments to enact long-arm statutes that make distant defendants amenable to service of process,<sup>46</sup> (the decision) of the Supreme Court that the Constitution permits state courts to exercise personal jurisdiction over defendants with very minimal contacts to the states,<sup>47</sup> and (the decision) of the Supreme Court in *Klaxon* that federal courts must apply the choice-of-law rules of the state in which they sit to decide diversity cases.<sup>48</sup>

Therefore, the ability of the plaintiff to select a fortuitous forum appears to be an unintentional "consequence of federalism"<sup>49</sup> that has no policy justification. This forum shopping puts the defendant at the immediate disadvantage of being called into a court in the jurisdiction that the plaintiff has determined will be most favorable to his claim. As a result, there is a chance that the case may wind up in a forum which is uneconomical and which has attenuated contacts with the cause of action.<sup>50</sup>

Some scholars and practitioners, however, argue that the dangers of forum shopping are exaggerated.<sup>51</sup> Brad-

---

<sup>46</sup> Reavley & Wesevich, *supra* note 4, at 26 & n.130, (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.042-.045 (Vernon 1986); LA. REV. CIV. STAT. ANN. §§ 13.3201-.3207 (West 1991)).

<sup>47</sup> Reavley & Wesevich, *supra* note 4, at 26 & n.131, (citing *Burnham v. Superior Court*, 495 U.S. 604, 610-16 (1990) (upholding constitutionality of transient jurisdiction) & *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (ruling that corporation is "subject to" state jurisdiction where it had no physical presence, but "deliberately created continuing obligations between itself and parties" in that state)).

<sup>48</sup> Reavley & Wesevich, *supra* note 4, at 26-27 & n.132 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

<sup>49</sup> Reavley & Wesevich, *supra* note 4, at 27. The authors add: "the present system only benefits the plaintiffs whose attorneys, through some combination of luck and skill, file suit in the state court that picks the law most favorable to their clients. The random distribution of this substantive advantage betrays its accidental and reasonless origin." *Id.* at 28.

<sup>50</sup> Kramer, *supra* note 39, at 313-14.

<sup>51</sup> *Id.* at 313; *see, e.g.*, Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS*, *supra* note 29, at 168-69; Robert

ley, of the United States Department of Justice, agrees<sup>52</sup> and maintains that a few isolated examples are made to look like common practice. In support of his theory, Bradley states,

I have only experienced one case, and know of very few others in which the choice of forum alone determined (major legal issues in the case). Most states use interest analysis or the *Second Restatement* (as their choice of law provision), which gives the judge leeway. All that said, very few judges are stupid enough to let the choice of forum dictate who wins (a lawsuit).<sup>53</sup>

While Bradley does not believe the system is perfect, he contends that its evils are overstated.

*Waste of Time and Resources:* Critics claim that the current choice of law system frequently leads to wasted time and resources, belonging to both the parties and the courts.<sup>54</sup> As discussed earlier, a plaintiff may choose to file the lawsuit in a distant state that has few minor contacts with the defendant. As a result, the parties may spend a great deal of time litigating jurisdiction before addressing the merits of the case. If the case remains in the distant forum, the parties must pay to try the case in a remote and inconvenient arena.<sup>55</sup> If the case is dismissed or transferred, the resources of the court and the parties have been wasted. In addition, the parties may spend time and money litigating the proper application of the forum's indeterminate choice of law provision (such as the *Second Restatement* or interest analysis). This is especially improvident, if after a

---

A. Sedler, *The Government Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 229 (1977).

<sup>52</sup> Bradley interview, *supra* note 43.

<sup>53</sup> *Id.* Bradley maintains that there are simply not that many cases where there is a real choice to forum-shop on issues of great significance, with the major exception being when one state has a 51% bar on contributory negligence or some other limitation on damage recovery.

<sup>54</sup> As far back as 1945, Justice Robert Jackson stated, "we are so accustomed to the delays, expense, and frustrations of our system that it seldom occurs to us to inquire whether these are wise, or constitutionally necessary." Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 18 (1945).

<sup>55</sup> Gottesman, *supra* note 8, at 12.

trial on the merits, an appellate court finds that the trial court erred in its choice of law determination.<sup>56</sup>

*Protection of Forum-State Interests:* Many choice of law approaches "include" the interests of other states in the choice of law consideration. Critics assert, however, that multistate interests are frequently ignored by courts seeking to further their own state policies, often protecting residents against nonresidents.<sup>57</sup> The *Second Restatement* lists "the needs of the interstate and international systems" amongst its "factors relevant to the choice of the applicable rule of law"<sup>58</sup> and Baxter's Comparative Impairment scheme instructs the court to apply the law of the state whose interests would be impaired most if its law were to be applied.<sup>59</sup> However, courts can manipulate the means of analysis used in their opinions.

Currie's interest analysis has opened the door for states to protect their own parochial interests. In response to a New York guest statute case, *Neumeier v. Kuehner*,<sup>60</sup> in which Chief Judge Fuld pronounced that compensating a nonresident "at the expense of a New Yorker does not further the substantive law purposes of New York,"<sup>61</sup> Donald T. Trautman stated, "[i]t is a perversion of a proper interest analysis to allow it to be whittled down to a concern for protecting the pocketbooks of residents at the expense of outsiders. Such considerations have no

---

<sup>56</sup> *Id.*

<sup>57</sup> Trautman, *supra* note 4, at 1721-26.

<sup>58</sup> RESTATEMENT (SECOND) *supra* notes 23, 25 at § 6(2)(a). Ten years before the issuance of the *Second Restatement*, Justice Traynor acknowledged the need to recognize the concerns of other states, citing the court's responsibility to "give effect to the common policy of both states . . . and sustain [a sister state's] interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of [the forum] state." *Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1961).

<sup>59</sup> Baxter, *supra* note 2, at 42.

<sup>60</sup> 286 N.E.2d 454 (N.Y. 1972). In this case, an automobile accident occurred in Ontario, killing both the New York driver and his Ontario passenger. Suit was brought in New York, because New York law would allow recovery. However, the court ruled that since the passenger was not a New York resident, recovery could not be had under the New York law. *Id.* at 458.

<sup>61</sup> *Neumeier*, 286 N.E.2d at 458.



place in the federal system.”<sup>62</sup> In an Oregon spendthrift statute case, *Lilienthal v. Kaufman*,<sup>63</sup> the court’s opinion stated “[c]ourts are instruments of state policy”<sup>64</sup> and “we should apply the choice-of-law rule which will ‘advance the policies and interests of’ Oregon.”<sup>65</sup> Trautman pronounced:

It is that attitude that I think should be expunged; courts should not find solace in the notion that their function is to do justice for residents. If the legislature has in fact commanded preferences for local residents, that command must be overcome; the cleanest and most appropriate means to that end is the Supremacy Clause, giving effect to a federal common law invalidating such self-serving doctrines.<sup>66</sup>

These types of cases give rise to the claim that the states have not been responsible in exercising the latitude granted them by the federal government in the area of choice of law. However, since courts are able to disguise the true justification underlying their determination, it is uncertain how many opinions were based on this rationale.

Defenders of the current choice of law system maintain that although it is not perfect, it is a known quantity and simply “‘built-into’ our federal system.”<sup>67</sup> Proponents of the existing structure believe that deference to state sovereignty is proper and that the heterogeneity in state choice of law rules simply reflects the dissimilarities in the states, their citizens, and their needs.<sup>68</sup> Patrick Bradley stated that

it makes sense for Washington to have different goals in its

<sup>62</sup> Trautman, *supra* note 4, at 1723.

<sup>63</sup> 395 P.2d 543 (Or. 1964).

<sup>64</sup> *Id.* at 549.

<sup>65</sup> *Id.* (quoting Alfred Hill, *Governmental Interest and the Conflict of Laws — A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474 (1960)).

<sup>66</sup> Trautman, *supra* note 4, at 1724. Trautman believes that a federal common law would free state court judges from such “parochial and self-serving local views.” *Id.*

<sup>67</sup> Sedler & Twerski, *supra* note 5, at 95.

<sup>68</sup> *Id.*

choice of law structure than, say, North Carolina. The states have different people, different industries, different interests and different laws. Each state has the right to have its interests given expression, and to deny that right would be to deny we are a country of fifty *different* states.<sup>69</sup>

Advocates of the status quo argue that the system is not that difficult for those who handle choice of law issues on a regular basis and that many of the negative results arise when attorneys and judges do not understand the various choice of law provisions.<sup>70</sup> In addition, they maintain that many of those who have criticized the process have proposed nothing to take its place. Finally, it can be argued that the hypotheticals that critics use to attack the system are carefully crafted and often reflect extreme situations.

## II. BRINGING UNIFORMITY TO CHOICE OF LAW: AN OFFER WE CAN'T REFUSE?

Although it is easy to stand on the sidelines complaining about the evils of the present choice of law system, some commentators have placed ideas "on the table" for consideration. They almost unanimously seek uniformity, but differ as to scope and method. Their goals include predictability, consistency, efficiency, mutuality, and fairness. Each plan has its own distinct strengths and weaknesses; some have been on the table for quite some time, while others are quite new. These propositions include (but are not limited to):

1) developing a RESTATEMENT (THIRD) of Conflict of Laws;<sup>71</sup> 2) drafting Multistate Canons of Construction for conflict situations;<sup>72</sup> 3) encouraging the National Conference of Commissioners on Uniform State Laws (NC-

---

<sup>69</sup> Bradley Interview, *supra* note 43.

<sup>70</sup> *Id.* (noting that many areas of legal practice are intricate and quite difficult for those practitioners who do not handle them on a regular basis).

<sup>71</sup> BRILMAYER, *supra* note 21, at 185-89. Brilmayer addresses the possibility of a *Third Restatement* and addresses its potential strengths and weaknesses. Brilmayer does not, however, explicitly state that a new Restatement would be the best solution to the choice of law situation.

<sup>72</sup> Kramer, *supra* note 39, at 320-38.

CUSL), that produced the Uniform Commercial Code, to promulgate a comprehensive treatment on choice of law;<sup>73</sup> 4) advocating that uniform federal choice of law rules should be imposed by the federal courts;<sup>74</sup> and 5) convincing Congress to adopt federal choice of law legislation, on an across the board or piecemeal basis in areas such as "mass tort"<sup>75</sup> or product liability.<sup>76</sup>

#### A. POSSIBLE RESTATEMENT (THIRD) OF CONFLICT OF LAWS

Twenty-three states currently follow the *Second Restatement* in deciding choice of law issues, so on the surface it would seem to make sense for the American Law Institute to draft an updated provision that could be followed by all fifty states. In discussing the possibility of such an occurrence, Lea Brilmayer said:

The Restatements enjoy numerous advantages in setting out cooperative conflict of law solutions. First, because the Restatements are comprehensive documents, they can cover a broad enough range of topics to link issues on which some states stand to benefit with issues on which the others do. Also, because they are comprehensive, they can be drafted to cover a wide range of contingencies and also give clear guidance. Courts should not have to guess too often about how cases ought to be decided because the goal is cooperative behavior, and coordination is not possible if the instructions are too vague. Third, the membership of the American Law Institute is drawn from all over the country and does not owe allegiance to a particular state or region. As a less political body than a typical state legislature, its solutions should reflect the interests of the multistate system as a whole and be perceived as relatively neutral.<sup>77</sup>

---

<sup>73</sup> Kramer, *supra* note 9, at 2146-49. Note that Kramer has placed more than one potential solution on the table. He can be compared to the fisherman who puts more than one line in the water, hoping to get a bite on at least one of them.

<sup>74</sup> See *infra* notes 103-09 and accompanying text.

<sup>75</sup> See, e.g., *supra* notes 4-5 and accompanying text.

<sup>76</sup> Gottesman, *supra* note 8, at 27.

<sup>77</sup> BRILMAYER, *supra* note 21, at 185.

The actual name "restatement" also poses a problem. Although some reform and modification can take place, the drafters are "nonetheless bound to a considerable degree by existing decisions,"<sup>78</sup> and are thus constrained to restating the rules in effect today. After hearing scholars and practitioners lambast the current structure, it is understandable why such an endeavor is unlikely to take place. In addition, scholars such as Larry Kramer believe that the advantages examined by Brilmayer could be achieved through similar action by the National Conference of Commissioners on Uniform State Laws (NCCUSL), without the restraints which limit a Restatement project.<sup>79</sup> Other advantages of NCCUSL action in this context are discussed later in this section.

The American Law Institute (ALI) has not been totally silent on the choice of law issue, however. The ALI has been working on a *Complex Litigation Project*, which would, among other things, attempt to provide a federalized choice of law provision for governing law in consolidated and transferred "mass tort" cases.<sup>80</sup> The project produced its third tentative draft in 1992.<sup>81</sup>

*Proposed Multistate Canons of Construction for Conflict Situations:* Choice of law scholar Larry Kramer has proposed that courts can resolve true conflicts by developing Canons of Construction which could be established in the theoretical framework of a "constructive multistate choice of law compact."<sup>82</sup> The goal is to formulate a set of canons which would produce optimum results under the

---

<sup>78</sup> Kramer, *supra* note 9, at 2148. Willis Reese, reporter for the *Second Restatement*, has been criticized for clinging to much of the *First Restatement*. In response, he has stated that he would have liked to abandon it, but was limited in what he could do by the existing decisions. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> A.L.I., COMPLEX LITIGATION PROJECT, §§ 7.01-.08 (Tent. Draft No. 3, 1992). The ALI project is modeled after the *Second Restatement*, and has undergone major revisions since its first draft. See Mullenix, *supra* note 4 (criticizing the ALI proposals).

<sup>81</sup> American Law Institute, *supra* note 80.

<sup>82</sup> Kramer, *supra* note 39, at 280.

particular circumstances.<sup>83</sup> Kramer's proposition appears to incorporate Currie's interest analysis in "false conflict" and "unprovided for" cases, but Kramer does not specifically address this apparent incorporation.

The theoretical foundation behind the establishment of multistate canons of construction is that there is no overarching principle which will provide the correct answer in any given case.<sup>84</sup> In fact, Kramer argues the opposite, that "true conflicts are difficult precisely because there is no general theory against which to measure the justice of the conflicting laws of different states. Because states are co-equal sovereigns, true conflicts present a dispute between competing but equally legitimate versions of what is just in a particular case."<sup>85</sup>

Kramer believes that the canons should be adopted by the state courts in legal areas where the state legislature has been silent, and adds that the states would benefit from: "(1) the advancement of multistate policies, (2) the reduction of forum shopping [thus enhancing the predictability of the legal system], and (3) greater assurance that each state's law is applied in the cases the state cares

---

<sup>83</sup> *Id.* Kramer describes the canons as "background presumption[s] about the legal system that [are] used to resolve uncertainty in interpretation." *Id.* at 320. He says they are needed when state legislatures fail to specify how state courts should integrate forum law with conflicting laws of other states. *Id.* at 318. According to Kramer, the canons would have to reflect the "kind of compromises that co-equal sovereigns would be likely to make." *Id.* at 319.

<sup>84</sup> *Id.* at 321. Kramer points to the *Second Restatement* in support of his belief that it is a miscalculation to try to base a comprehensive choice of law scheme on some global theory. He states:

The *Second Restatement* purports to derive presumptive rules from the "theory" that the applicable law is the law of the state with the "most significant relationship," which means the state that seems most entitled to have its law applied in light of an extensive list of factors. This list includes about everything anyone ever suggested might be meaningful to choice of law analysis — though with no explanations of why any of these factors are in fact relevant. The "theory" of the *Second Restatement* thus calls for the post hoc rationalizing of intuitions about whose law ought to apply. Unfortunately, since the *Restatement* provides no assistance in honing, organizing or explaining these intuitions, its theoretical framework has no explanatory power.

*Id.* at 321-22 & n.149.

<sup>85</sup> *Id.* at 280.

about most.”<sup>86</sup>

An initial set of canons is proposed, but Kramer encourages scholars and practitioners to articulate additional ones.<sup>87</sup> Although he states that courts *may* apply this initial set of canons, there seems to be hope that they will be refined and incorporated into a Restatement or other uniform provision.<sup>88</sup> Kramer provides no other specific details on how he envisions the canons would be adopted. The proposed canons include:

“A. A Comparative Impairment Canon: If there is a conflict between two states’ laws, and failure to apply one of the laws would render it practically ineffective, that law should be applied.”<sup>89</sup>

“B. A Substance/Procedure Canon: In a conflict between a substantive policy and a procedural policy, the law reflecting the substantive policy should prevail unless the forum’s procedural interest is so strong that the forum should dismiss on grounds of *forum non conveniens*.”<sup>90</sup>

“C. A Canon for Contract Cases: In contracts cases, true conflicts should be resolved by applying the law chosen by the parties, or, if no express choice is made, by applying whichever law validates the contract.”<sup>91</sup>

---

<sup>86</sup> *Id.* at 319.

<sup>87</sup> *Id.* at 322. Kramer’s goal in proposing the canons seems to be to facilitate discussion and debate. He does not pretend that his canons are a final product that should be immediately adopted. New canons could evolve as courts face situations in which they are needed and scholars could help the courts in analyzing their possible effects.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at 323. Kramer asserts that this canon should be applied first, since it is in the best interest of every state to prevent another state’s law from being rendered entirely ineffective. *Id.* at 323-24.

<sup>90</sup> *Id.* at 324. This canon supposedly espouses the substance/procedure balance struck in the *Erie* framework. The canon is based on the assumption that states generally favor substantive to procedural policies and that the principal intent of procedural law is to implement substantive law efficiently and accurately. *Id.* at 324-29.

<sup>91</sup> *Id.* at 329. Kramer is very tentative in this proposal, specifying that he is not advocating party choice in all situations, but rather just in cases in which there is a potential for a true conflict. Kramer fails to acknowledge that, with the interstate nature of contracts, a majority of contracts would probably fall under his provision, thus making his limitation practically meaningless. *Id.* at 329-34.

"D. A Canon for Laws that are Obsolete: Where one of two conflicting laws is obsolete (i.e., inconsistent with prevailing legal and social norms in the state that enacted it), the other law should be applied."<sup>92</sup>

"E. A Canon for Actual Reliance Interests: Where two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied."<sup>93</sup>

Kramer believes that these canons could work because they address each state's desire to advance multistate policies and curb forum shopping.<sup>94</sup> He places faith on the assumption that the states will look at the big picture of a multistate system, and not get bogged down in protecting their own interests in the particular case at hand. He does acknowledge that the success of these canons of construction depends on reciprocity amongst the states. State A would apply the canons if State B were a "canon" jurisdiction, but not otherwise.<sup>95</sup>

*A Comprehensive Uniform Choice of Law Code Promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL):* Although Larry Kramer has left his proposal for multistate canons of construction on the table, he seems to have recognized one of the obstacles to their realization — without being promulgated by a national legislative or judicial body, or being proposed by a formal organization, there is almost no chance of their adoption

---

<sup>92</sup> *Id.* at 334. Kramer does a good job of explaining how an obsolete statute could technically still be in effect, stating that legislatures usually are not aware of the situation and, even if they are, they are "too occupied with new business to devote time to old problems that are not pressing; legislators rarely disturb the status quo without pressure from some interested group, and the effects of obsolete laws are usually too diffuse or too sporadic to generate organized lobbying efforts." *Id.* at 334. As a result, these laws stay on the books, despite their age and inconsistency with prevailing norms.

<sup>93</sup> *Id.* at 336-38.

<sup>94</sup> *Id.* at 341.

<sup>95</sup> *Id.* Kramer acknowledges that states may become involved in a "choice of law version of the prisoner's dilemma" (discussed, *infra*, note 169), but has faith that they will have the patience to play the game a number of times before giving up. *Id.* He adds that conditioning canons on reciprocity from sister states has the effect of "reduc[ing] an enormously complex 50-person game into a series of linked 2-person games." *Id.* at 343 n.228.

by fifty states. Therefore, Kramer has recommended that the National Conference of Commissioners on Uniform State Laws (NCCUSL), which produced the Uniform Commercial Code, prepare a comprehensive Uniform Choice of Law Code which could be positively enacted by the state legislatures.<sup>96</sup>

A NCCUSL code would offer many of the advantages that Lea Brilmayer discussed when addressing the possibility of a *Third Restatement*,<sup>97</sup> but there are some differences which make a uniform code a more attractive option. First, each state has designated delegates on the NCCUSL, and these representatives are aware of the interests of their state as specific provisions are negotiated.<sup>98</sup> In addition, unlike a Restatement, a uniform code could be positively enacted by state legislatures, thus giving it more authority and longevity.<sup>99</sup> Finally, those who formulate a uniform code are not bound by existing decisions, as are drafters of a Restatement. This provides the freedom to escape from the mistakes of the past.<sup>100</sup>

Kramer believes that the reputation of the NCCUSL would add credibility to a completed work and thinks that with the prevailing dissatisfaction with the current system, a well written code would become widely accepted relatively quickly.<sup>101</sup> Indeed, if such a compilation is adopted by a few important states (such as Texas, New York, Florida and California) — as was the case with the Uniform

---

<sup>96</sup> Kramer, *supra* note 9, at 2146.

<sup>97</sup> See BRILMAYER, *supra* note 21, at 185.

<sup>98</sup> Kramer, *supra* note 9, at 2148 & n.35. This distinguishes the NCCUSL from the American Law Institute.

<sup>99</sup> *Id.* Statutory codification is not the goal of a Restatement project, and thus if legislative action is the preferable course of action, an organization like the NCCUSL would have to step to the forefront. See William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It."*, RESTATEMENT IN THE COURTS 19 (perm. ed. 1945) ("there has never been any desire to give [the Restatement] statutory authority").

<sup>100</sup> Kramer, *supra* note 9, at 2148; see also Lewis, *supra* note 99, at 19.

<sup>101</sup> Kramer, *supra* note 9, at 2149. Kramer states that a code would be "quite popular," but does not discuss in detail how quickly he thinks such a provision could actually be adopted. *Id.*



Commercial Code — other states may quickly follow.<sup>102</sup> However, to date the NCCUSL has not seriously considered undertaking such a project, and there are no indications as to whether the organization will do so.

*Uniform Federal Choice of Law Rules to be Imposed by the Courts:* Commentators who do not trust the states to adopt uniform choice of law proposals on their own have two other places to look: Congress and the federal courts. Those who believe judicial action is appropriate have at least three major options to consider: (1) have the Supreme Court interpret the Constitution (especially the Full Faith and Credit Clause) in a manner which would place greater restrictions on the choices of law available to a forum court;<sup>103</sup> (2) have the federal judiciary proclaim a “federal common law” of conflicts that would bind both state and federal courts;<sup>104</sup> or (3) have the Supreme Court reverse *Klaxon v. Stentor Elec. Mfg. Co.*<sup>105</sup> and prescribe federal choice of law rules to govern diversity suits in federal courts.<sup>106</sup>

Proponents of the first approach would interpret the Full Faith and Credit Clause of the Constitution to prevent a state from applying its own law even if it has some meaningful contacts with or interest in the case, if the interests or contacts of another state are clearly more substantial.<sup>107</sup> Such action would help protect against the forum-state overprotecting its own interests. Critics, however, claim that this technique would seem to “oblige the Supreme Court to ‘enact’ an entire jurisprudence of conflict of laws — an enormous undertaking, which would

---

<sup>102</sup> *Id.*

<sup>103</sup> Gottesman, *supra* note 8, at 19 & n.73, (citing Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 722 (1983)); Frederic Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 120 (1976); Willis Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 201 (1981); Gary Simson, *State Autonomy and Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 65-66 (1978)).

<sup>104</sup> Gottesman, *supra* note 8, at 20 & n.74.

<sup>105</sup> *Id.* at 20 & n.75.

<sup>106</sup> *Id.* See generally *supra* note 8, at n.103.

<sup>107</sup> Gottesman, *supra* note 8, at 20 (discussing *Klaxon*, 313 U.S. 487 (1941)).

tax the Court's resources and institutional capacity — and which the historical materials suggest [was] beyond the framers' contemplation when they authored the Full Faith and Credit Clause."<sup>108</sup> The Supreme Court has shown no interest whatsoever in changing its current practice.

Those who advocate a "federal common law" of choice of law would like to see the Supreme Court, and the federal court system, set elaborate standards which would be applicable to the states.<sup>109</sup> Proponents claim that absent Congressional action, the Court has the power under the Full Faith and Credit Clause and the implementing statute to specify which state's law is authoritative in any given class of cases.<sup>110</sup> In fact, some believe that this is actually a duty of the Court, and that the Court's failure to address the choice of law issue is a "major abdication of responsibility."<sup>111</sup> Douglas Laycock points out that "[t]here is nothing anomalous about such a set of court-made rules;"<sup>112</sup> and that in the past, in cases involving both states and private parties, the court has created federal common law to resolve interstate disputes in areas such as boundaries and water rights.<sup>113</sup> Laycock goes on to say that "[a] federal common law of choice of law to implement the Full Faith and Credit Clause and Act would also parallel the federal common law implementing other statutes and constitutional clauses."<sup>114</sup>

---

<sup>108</sup> *Id.*

<sup>109</sup> Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 331 (1992); see Baxter, *supra* note 2, at 40-42; Horowitz, *supra* note 2, at 1200-09.

<sup>110</sup> Laycock, *supra* note 109, at 331.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 333.

<sup>113</sup> *Id.* at 333 & nn.462-64 (citing *Oklahoma v. New Mexico*, 111 S. Ct. 2281 (1991); *Illinois v. Kentucky*, 500 U.S. 380 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987)).

<sup>114</sup> *Id.* at 333. Laycock states that the Court often "makes federal common law to implement federal statutes, sometimes explicitly, as in the enforcement of labor contracts, sometimes without acknowledgement [sic], as in the law of federal injunctions against state judicial proceedings, and sometimes in the guise of interpreting a silent statute, as in the law of damages and immunities under section 1983." *Id.* at 333-34 & nn.467-70.

Critics, however, mention the political and practical infeasibility of such a move. In addition, they question this interpretation of Full Faith and Credit, and contend that the Court has no Constitutional authority to pronounce such law.<sup>115</sup>

The proposition to overturn *Klaxon* is free of many of the attacks fired at the first two proposals; however, it creates an entirely new problem. Since the prescribed rules would only apply to federal courts, the states would still be free to do as they wish. The result would be to re-open the door to the inconsistency which led to the Court's decision in *Erie*.<sup>116</sup> The American Law Institute studied the merits of this proposal, and found that the "vice of inconsistent outcomes" overshadowed any possible benefits.<sup>117</sup>

Some critics of judicial action in the choice of law arena argue that the courts make bad rules.<sup>118</sup> Laycock counters by saying that "all courts make mistakes, but where uniformity and non-discrimination are the goals, one neutral, ultimate authority is better than fifty biased, ultimate authorities."<sup>119</sup> In addition, even if the court were to mess up, lower courts would tell it so, or Congress could step in and legislate.<sup>120</sup> Nonetheless, it is hard to picture the court making a pronouncement that would cause the confusion and chaos that has become commonplace in the current structure.<sup>121</sup>

*Possible Congressional Action in the Choice of Law Arena:* Some scholars believe that the United States Congress is the appropriate venue for bringing change to the choice of law framework. Those who prefer legislative action

<sup>115</sup> Gottesman, *supra* note 8, at 18.

<sup>116</sup> *Id.* at 21.

<sup>117</sup> *Id.*; see, e.g., A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166-69 app. A (1965).

<sup>118</sup> Laycock, *supra* note 109, at 335 n.479 (citing David F. Cavers, *The Changing Choice of Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 737-38 (1963) (arguing that historical "record of the federal judiciary as umpires in cases of conflicting state laws was far from distinguished")).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

claim that Congress was *expressly* given the power, under the Full Faith and Credit Clause, to pronounce choice of law rules binding on both state and federal courts.<sup>122</sup> They prefer the legislative branch to the judiciary, asserting that Congress is institutionally capable of "promulgating a code of the complexity that might be necessary to create a coherent choice of law scheme," whereas the Supreme Court is not.<sup>123</sup> Furthermore, Congress can construct administrative mechanisms, if needed, to assure that the federal judiciary would not be overburdened, and to guarantee that the language of the law would receive consistent interpretation and application throughout the country.<sup>124</sup> Finally, proponents contend that since each state has representatives in Congress, the entire country will have a say in the content of any new provision.<sup>125</sup>

The initial question is under what authority may Congress establish choice of law standards for the states. Arthur Miller and David Crump suggest that this prerogative comes from a number of Constitutional provisions including the due process, diversity jurisdiction, equal protection, privileges and immunities, commerce, and full faith and credit clauses.<sup>126</sup> Although scholars debate whether some of these provisions would grant such power, most of them agree that the Full Faith and Credit Clause, and especially the Effects Clause contained therein, empowers Congress to establish choice of law rules that bind the states.<sup>127</sup> The Effects Clause states: "Congress may by general Laws prescribe the Manner in which such Acts,

---

<sup>122</sup> Gottesman, *supra* note 8, at 21.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 21-22. Gottesman seems to think that each state will have a voice in the process. He does not, however, account for the fact that certain states would have a much greater voice due to a larger congressional delegation. It is hard to believe that Delaware could be very successful in pushing a provision opposed by California, New York, or Texas.

<sup>126</sup> Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 78 (1986).

<sup>127</sup> Gottesman, *supra* note 8, at 23; Laycock, *supra* note 109, at 331-36; Reavley & Wesevich, *supra* note 4, at 18 & n.93.

Records and Proceedings shall be proved, *and the Effect thereof*.”<sup>128</sup> Although there is a small dissent,<sup>129</sup> the overwhelming consensus is that this clause gives Congress all it needs to legislate in the choice of law arena.<sup>130</sup>

Early proposals suggested that Congress pass an across-the-board choice of law provision.<sup>131</sup> The predominant view among scholars who support Congressional action, however, is that legislation should be adopted to cover multistate conflicts in certain specific areas of substantive law. Michael Gottesman asserts that Congress should take action “wherever a subject is a frequent source of litigation with multistate implications, and the costs of indeterminacy and/or non-neutrality have grown unacceptable . . . .”<sup>132</sup> Precise fields which have been mentioned include vehicular and common carrier accidents and other mass tort cases, products liability, internal corporate affairs, medical malpractice, and toxic torts,<sup>133</sup> and the list is by no means meant to be complete.

A great deal of scholastic debate focuses on the specific standards that Congress should incorporate into a choice of law statute. The opposing viewpoints are nothing new: those who favor a specific, rule based system versus those who wish to see a provision which allows the courts to take certain “factors” into consideration.<sup>134</sup> A tighter, more direct test would enhance predictability, uniformity,

---

<sup>128</sup> U.S. CONST. art. IV, § 1 (emphasis added).

<sup>129</sup> Gottesman, *supra* note 8, at 26. Gottesman states that “[h]istorical faithfulness led Walter Wheeler Cook to conclude, with regret, that the federal choice of law statute he favored could apply only to state statutory law, as Congress seemed to lack power to compel obedience to another state’s common law.” *Id.*

<sup>130</sup> *Id.* at 23. Michael Gottesman states: “Scholars are virtually unanimous in their view that Congress has the power to enact federal choice of law statutes.” *Id.*

<sup>131</sup> See *id.* at 17 (identifying Walter W. Cook as a “proponent of a federal statute that would dictate when one state’s courts were required to enforce rights created by another state’s statutes”) (citing Walter W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 25 YALE L.J. 421, 432-33 (1919)).

<sup>132</sup> *Id.* at 16.

<sup>133</sup> *Id.*

<sup>134</sup> Kramer, *supra* note 9, at 2136-40; see also discussion on choice of law provisions included in the Multiparty Multiforum Jurisdiction Act, *infra* notes 138-63 and accompanying text.

and certainty; but such a standard could "run counter to progressive trends in choice of law and impose a choice of law straightjacket . . ." <sup>135</sup> on the system. An open ended, interest considering criterion could provide the flexibility needed in certain cases, but could also reopen the floodgates of unpredictability and uncertainty.

Another goal, and probable effect, of a legislative choice of law provision would be to shut down certain escape devices that currently vex conflict-based litigation, such as a public policy override, *renvoi*, <sup>136</sup> and, to some extent, characterization. <sup>137</sup> The law should also address the applicability and enforceability of the states' statute of limitations provisions.

After all that has been said about the possibility of Congressional action in the choice of law scheme, there has only been one legislative proposal which would impose a choice of law standard on an area of substantive law. The Multiparty Multiforum Jurisdiction Act <sup>138</sup> (the Bill) was originally introduced during the 100th Congress by Congressman Robert W. Kastenmeier, the Wisconsin Democrat who chaired the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice (Subcommittee on Courts). <sup>139</sup> The Bill would federalize consolidation and choice of law

---

<sup>135</sup> Robert A. Sedler & Aaron Twerski, *State Choice of Law in Mass Tort Cases: A Response to "A View From the Legislature,"* 73 MARQ. L. REV. 625, 627 (1990).

<sup>136</sup> Gottesman, *supra* note 8, at 47 n.159 ("Renvoi is the practice by which the courts in State A, having determined that State B's law ought to regulate the dispute, look to the whole law of state B rather than its substantive law (thus creating the possibility that the substantive law of a state other than State B will be applied)").

<sup>137</sup> *Id.*

<sup>138</sup> Currently the Multiparty, Multiforum, Jurisdiction Act, H.R. 1100, 103rd Cong., 1st Sess. (1993); H.R. 2450, 102d Cong., 1st Sess. (1991); H.R. 3406, 101st Cong., 2nd Sess. (1990); Originally the Court Reform and Access to Justice Act, H.R. 4807, 100th Cong., 2d Sess. (1988).

<sup>139</sup> For further discussion on this Bill, see Kastenmeier & Geyh, *supra* note 4 (Kastenmeier, author of the Bill, and Geyh [pronounced "jay"], former Subcommittee Counsel, argue the merits of the Bill and respond to Sedler & Twerski's initial criticism); Reavley & Wesevich, *supra* note 4, at 5-8, 18-49, (arguing for the need of such legislation, but proposing a strict "place of injury" choice of law provision); Sedler & Twerski, *supra* note 135 (responding to Kastenmeier and

for any lawsuit arising from an accident that kills or injures twenty-five or more people (who sustain at least \$50,000 in bodily or property damage) and that relates to more than one state. The Bill would consolidate all litigation related to the particular accident into one federal forum. The federal court would then apply the choice of law provision in the Bill (as opposed to the choice of law provision of any particular state) to determine which *one* state's substantive law would govern *all* claims relating to the accident.<sup>140</sup> The court would try all issues of liability and assess punitive damages, if appropriate. The transferee court would then return the case to its original forum for separate compensatory damages assessments.<sup>141</sup>

The Kastenmeier Bill passed the House at the end of the 100th Congress under the name "Court Reform and Access to Justice Act of 1988" (H.R. 4807), and also passed the House at the conclusion of the 101st Congress under its current name (H.R. 3406). Following that vote, the Bill appeared on the Senate consent calendar for final passage, but was dropped from the calendar when Sena-

---

Geyh); Sedler & Twerski, *supra* note 5 (discussing substantial and theoretical weaknesses in the Bill).

<sup>140</sup> No one has stated what effect the choice of law provisions of the Federal Tort Claims Act [hereinafter "FTCA"] would have on the operation of the Multiparty, Multiforum Bill. Under the FTCA, which applies to government defendants, the law of the state of conduct applies — including that state's choice of law rules. The government is often a defendant in single collision mass tort cases, and the FTCA would seem to prevent the law of a state other than the state of conduct from governing all claims relating to the accident when the government is among the defendants.

Matt Pappas, Assistant Counsel to the Senate Committee on the Judiciary Subcommittee on Courts and Administrative Practice [hereinafter "Senate Subcommittee"], stated in a telephone interview that he was not aware if the FTCA issue had ever been raised in consideration of the Bill and he had never given it any thought. Pappas assumes that the FTCA provision would prevail in the case of government defendants, but agrees that the issue should be discussed if it has not been already. Telephone interview with Matt Pappas, Assistant Counsel to the Senate Subcommittee, May 13, 1993.

<sup>141</sup> See, e.g., 137 Cong. Rec. H11261-64 (daily ed. Nov. 25, 1991) (Statement of Rep. Hughes) (Floor reading and House Debate on H.R. 2450); HOUSE COMM. ON THE JUDICIARY, MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 1991, H. R. REP. NO. 373, 102d Cong., 1st Sess. (1991) (House Committee report explaining operation and policy justification for the Bill).

tor Howell T. Heflin, a Democrat from Alabama, objected that his subcommittee, the Senate Judiciary Subcommittee on Courts and Administrative Practice, had not had time to hold a hearing on the Bill.<sup>142</sup> Congressman William Hughes, a Democrat from New Jersey, replaced Rep. Kastenmeier as chair of the subcommittee, since renamed "Intellectual Property and Judicial Administration." Hughes reintroduced the bill as H.R. 2450 in the 102nd Congress. The legislation again passed quickly and easily through the House, but bogged down in the Senate. This time Senator Heflin's Subcommittee held hearings on the Bill,<sup>143</sup> but the Senate Subcommittee let it die without ever coming to a vote. Congressmen Hughes has reintroduced the Bill in the 103d Congress as H.R. 1100.<sup>144</sup>

The choice of law provision in the current version of the Bill lists five factors a court may consider in deciding which state's substantive law to apply, but, the Bill does not explain the relative importance of the factors or require that a court base its decision on one of them.<sup>145</sup>

---

<sup>142</sup> See Kastenmeier & Geyh, *supra* note 4, at 559 & n.84. In addition to Chairman Heflin, the Senate Subcommittee consists of Sen. Howard M. Metzenbaum of Ohio, Sen. Herbert Kohl of Wisconsin, Sen. Charles E. Grassley of Iowa, and Sen. Strom Thurmond of South Carolina. *The Multiparty, Multiforum Jurisdiction Act of 1991: Hearing on H.R. 2450 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 102-982 (1992) [hereinafter Senate Hearing Report].

<sup>143</sup> Present to testify at the hearing on January 28, 1992 were Douglas P. Beighle, Senior Vice President, the Boeing Company, Seattle, WA; Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, Department of Justice; Lee S. Kreindler, Counsel, Kreindler & Kreindler, New York, NY; Michael S. Olin, Counsel, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, Miami, FL.; Thomas M. Reavley, Senior Judge, U.S. Court of Appeals for the Fifth Circuit, on behalf of the Federal State Jurisdiction, Judicial Conference of the United States, Austin, Tex.; Maurice Rosenberg, Professor of Law, Columbia University School of Law, New York, NY; and Robert A. Sedler, Wayne State University, Detroit MI. Senate Hearing Report.

<sup>144</sup> The Bill introduced in the 103d Congress is identical in form to the version that passed the House of Representatives during the 102d Congress (H.R. 2450). H.R. 1100, 103d Cong., 1st Sess. (1993).

<sup>145</sup> The Choice of Law provision of H.R. 1100 reads as follows:

SEC. 6. CHOICE OF LAW

(A) DETERMINATION BY THE COURT. — Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:



Although these factors still provide room for manipulation, they are less subjective than the ten-factor choice of law criteria included in earlier versions of the Bill.<sup>146</sup> In addition, the Bill now includes an escape clause that al-

---

1659. Choice of Law in multiparty, multiform actions

(a) In an action which is or could have been brought, in whole or in part, under section 1368 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include —

- (1) the place of injury;
- (2) the place of the conduct causing the injury;
- (3) the principal places of business or domiciles of the parties;
- (4) the danger of creating unnecessary incentives for forum shopping; and
- (5) whether the choice of law would be reasonably foreseeable to the parties.

The factors set forth in paragraphs (1) through (5) shall be evaluated according to their relative importance with respect to the particular action. If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action.

(b) The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1368 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

(c) In an action remanded to another district court or State court under section 1407(i)(1) or 1441(e)(2) of this title, the district court's choice of law under subsection (b) shall continue to apply.

(B) CONFORMING AMENDMENT. — The table of sections at the beginning of chapter 111 of title 28, United States Code, is amended by adding at the end the following new item:

1659. Choice of law in multiparty, multiform actions.

H.R. 1100, 103d Cong., 1st Sess. § 6 (1993).

<sup>146</sup> The version of Rep. Kastenmeier's bill which was passed by the House of Representatives in both the 100th and 101st Congresses (H.R. 3406) contained the following list of factors for a court to consider in choosing the applicable law:

- (1) the law that might have governed if the jurisdiction created by section 1367 of this title did not exist;

lows the law of more than one state to be applied "[i]f good cause is shown in exceptional cases, including constitutional reasons."<sup>147</sup>

Proponents of the Bill claim that the choice of law provisions were well thought-out, heavily reviewed, and extensively revised. They argue that the Bill addresses the legitimate need to provide relief for an already overwhelmed judicial system.<sup>148</sup> This is done while eliminating problems of forum shopping and nonuniformity. Edward H. O'Connell, Minority Counsel for the House Committee on the Judiciary Subcommittee on Intellectual Property and Judicial Administration, professes that the

---

(2) the forums in which the claims were or might have been brought;

(3) the location of the accident on which the action is based and the location of related transactions among the parties;

(4) the place where the parties reside or do business;

(5) the desirability of applying uniform law to some or all aspects of the action;

(6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness;

(7) the danger of creating unnecessary incentives for forum shopping;

(8) the interest of any jurisdiction in having its law apply;

(9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply; and

(10) any agreement or stipulation of the parties concerning the applicable law.

H.R. 3406, 101st Cong., 2d Sess. § 6 (1990).

H.R. 3406 did not include the "escape clause" that currently follows the five factors contained in H.R. 1100. *Id.*

<sup>147</sup> 137 CONG. REC. H11,262 (daily ed. Nov. 25, 1991).

<sup>148</sup> Any single disaster can produce a thousand lawsuits and can wreak havoc on the courts. *See, e.g., In re Paris Air Crash*, 399 F. Supp. 732, 735-36 (C.D. Cal. 1975) (The number of . . . claims [is] unknown, but unofficial estimates have placed the number at about 1,000), *cited by* Reavley & Wesevich, *supra* note 4, at 2. During floor debate in the House, Rep. Hughes stated:

Unfortunately, we often start our day by learning that, somewhere in the United States, a plane has crashed, a hotel has burned, or two trains have collided. Whenever tragedies such as these occur, tens, hundreds, and sometimes thousands of suits may be filed by the victims or their families in a multitude of State and Federal courts seeking compensation for their losses. Despite the fact that these suits present identical issues of fact and law, there is often no way under our current system to try all these suits in one court.

137 CONG. REC. H11,263 (daily ed. Nov. 25, 1991).

"five factors" have been unfairly criticized stating: "in most cases the appropriate law will be the law of the situs. Except in isolated cases, the determination will not be difficult, especially for a federal judge."<sup>149</sup>

With regard to state rights, supporters also claim that in the face of an overriding federal objective, state law is properly displaced.<sup>150</sup> Even those who feel that the choice of law provision should be modified admit that "the norms that will be applied to determine liability in these cases are not those of barbaric satrapies; they are rules of law adopted by states of the Union. As such, they are not likely to be either unjust or unfair except on the rarest occasions."<sup>151</sup>

The bill has the support of the American Law Institute, the Judicial Conference, and the Department of Justice.<sup>152</sup> Deputy Assistant Attorney General Stephen Bransdorfer, testifying on behalf of the Department of Justice in front of the Subcommittee on Courts and Administrative Practice, stated that the choice of law provision "cuts through the complications of 'balancing' state 'interests,' thus saving the courts time and the litigants money."<sup>153</sup> He argued that "[v]ictims of mass torts should have similar claims decided in a similar fashion, and should receive prompt compensation for their injuries with a minimum of litigating costs."<sup>154</sup> Bransdorfer stated that the Bill would provide much-needed certainty and that the advan-

---

<sup>149</sup> Interviews with Edward H. O'Connell, Minority Counsel for the House Committee on the Judiciary Subcommittee on Intellectual Property and Judicial Administration, in Washington, D.C. (Mar. 18 and 19, December 15, 1993) [hereinafter O'Connell interviews].

<sup>150</sup> Kastenmeier & Geyh, *supra* note 4.

<sup>151</sup> Senate Hearing Report, *supra* note 142, at 69 (prepared written statement of Maurice Rosenberg). Professor Rosenberg testified, "[I]f the law of Alabama or Michigan is applied, it is not going to be the law of some barbaric, outlandish country. It is going to be the law of one of the States that is applied, and it is not likely to be terribly unjust and unfair." *Id.* at 61-62.

<sup>152</sup> 137 CONG. REC. H11,263 (daily ed. nov. 15, 1991) (statement of Rep. Moorhead).

<sup>153</sup> Senate Hearing Report, *supra* note 142, at 17 (prepared written statement of Stephen Bransdorfer).

<sup>154</sup> *Id.*

tages far outweigh the disadvantages.<sup>155</sup>

Critics assert that the optional, five-factor choice of law criteria will present the same problems of indeterminacy that plagued the states for years. They fear charges of bias and result-orientation, similar to those charges that have long been directed at the states.<sup>156</sup> Furthermore, critics maintain that "creating a federal choice of law standard usurps the traditional role of state law in supplying the choice of law rules that govern state law disputes."<sup>157</sup>

The Conference of Chief Justices opposes the Bill, citing the possibility of a "significant impact on the substantive rights of the parties, contrary to the holding in the *Klaxon* case that diversity cases require federal courts to apply the choice of law principles of the forum state."<sup>158</sup> Robert Sedler argues that the Bill's choice of law provision "carves a gaping hole in *Klaxon*, displacing well-defined state choice of law rules with an *ad hoc* choice of law determination of the 'law of a single state' by a federal judge before whom the 'mass tort' case has been consolidated."<sup>159</sup>

Other critics, Thomas M. Reavley and Jerome W. Wesevich, agree with the Bill's authors that Congress has the right to enact such a provision, but argue that the Bill should contain a strict territorial or law-based choice of law provision to check judicial discretion. Reavley and

---

<sup>155</sup> *Id.* at 23. Bransdorfer calls the Bill a "substantial step forward." *Id.*

<sup>156</sup> Sedler & Twerski, *supra* notes 5, 135.

<sup>157</sup> Kastenmeier & Geyh, *supra* note 4, at 564 (paraphrasing the objections of Sedler and Twerski).

<sup>158</sup> Senate Hearing Report, *supra* note 142, at 20 (resolution XIII of the Conference of Chief Justices). The Senate Hearing Report includes a copy of a letter to Sen. Heflin from Robert N.C. Nix Jr., Chief Justice of the Supreme Court of Pennsylvania and President of the Conference of Chief Justices. *Id.* at 19. The letter states that the Bill would interfere with the traditional tort law responsibility of the states "by authorizing bifurcated trials, and injecting federal courts into determining substantive rights of parties, all of this without a clear demonstration of need, or of inadequate response by the states." *Id.*

<sup>159</sup> *Id.* at 95 (prepared written statement of Robert A. Sedler). Sedler asserted that, in the end, "the [B]ill would destroy completely the basic premise of *Erie* and *Klaxon* that in a case where federal jurisdiction is founded solely on the basis of diversity of citizenship, there should be uniformity of result between state and federal courts." *Id.*

Wesevich propose that "all claims arising from each single-accident mass tort be "governed by the substantive law of the State where the accident physically harms the greatest number of natural persons."<sup>160</sup> They claim such a rule would foster uniformity, efficiency, determinability, and fairness.<sup>161</sup>

As can be deduced from the various arguments, the effects of the Multiparty, Multiforum Bill, if passed, remain uncertain. Currently the system can be described as "two tiered confusion;" the court must first decide which state's choice of law provision to apply, and then determine the applicable substantive law. Both of these tests are often complicated, and present various issues for litigation. The Bill would eliminate the first "tier" of this analysis. In a mass tort situation, the Bill's choice of law provision would apply, and the only task for the court would be to determine which substantive law should govern. By eliminating the number of issues to be litigated, the Bill could eventually lighten the load on the federal judicial system.

By providing that mass tort cases will be heard in one federal court, the Bill places the choice of law determination in the hands of the federal judiciary. These judges will have the opportunity to develop expertise on the matter and will be removed somewhat from the parochial interests of the states. Over time, patterns would develop in the interpretation and application of the choice of law rules. Eventually it could be possible to predict with some certainty which state's substantive law would apply in a given situation. This would allow potential tort defendants to have some idea about what substantive law would govern their actions.

If the Bill were passed and implemented, choice of law scholars would have an opportunity to analyze its results.

---

<sup>160</sup> Reavley & Wesevich, *supra* note 4, at 43.

<sup>161</sup> *Id.* at 43-44 (claiming such a provision "facilitates perfectly uniform legal standards . . . is impervious to after-the-fact manipulation by parties or courts . . . is also highly determinate, . . . fosters efficiency, . . . (and) rests on solid constitutional and theoretical ground").

Mass tort cases would be placed in the academic "fishbowl," and the Bill's effects would be closely examined, with the debate focused on what has actually taken place. This transition from the hypothetical to the practical would definitely be a step in the right direction. As a result, other initiatives could eventually follow, leading to positive change in the choice of law arena.

It has yet to be seen whether the Multiparty, Multiforum Jurisdiction Act will clear its Senate hurdle. To have repeatedly passed through the House without dissent, one of two things must have occurred: either there was an overall consensus in support of the Bill, or no one really knew what they were voting for. O'Connell personally thinks that Senator Heflin has felt plenty of pressure from a small portion of the plaintiffs bar to keep the Bill from ever reaching the floor.<sup>162</sup> In addition, Sen. Heflin seemed to be bothered by some of the testimony on the Bill, especially that which referred to its effect on his home state of Alabama.<sup>163</sup> However, it may just be that in a country with plenty of political problems, this Bill is just not a high priority. Regardless, the Bill is one attempt to address a choice of law problem and try to do something about it. That alone is a start.

---

<sup>162</sup> O'Connell Interviews, *supra* note 149. O'Connell interprets a Heflin staffer's comment that "certain practitioners have expressed concern" to mean that there has become a certain level of pressure from PAC's (Political Action Committees) representing various legal constituencies who oppose the bill. *Id.*

<sup>163</sup> Sen. Heflin seemed especially bothered by the following hypothetical presented by Robert Sedler: An Alabama bus carrying a group of Alabamians (and one Mississippian) crosses into Mississippi and is involved in a collision with a truck driven by a Mississippi driver. Sedler claims that under the Bill's choice of law provisions, Alabama would not be able to apply its law to the claim of the Alabama parties, stating that "Alabama's sovereignty, its strong policy, is going to be thwarted." Senate Hearing Report, *supra* note 142, at 119. As Sen. Heflin noted, Alabama may be the only state in the Union where in a wrongful death case the measure of damages is punitive in nature alone; no compensatory damages are allowed. Throughout the hearing, Heflin appears concerned that this and other Alabama laws may not be applied. *Id.* at 120.

### III. CERTAIN REALITIES WHICH WILL KEEP A UNIFORM CHOICE OF LAW PROVISION FROM EVER BEING AN ACTUALITY: DEAL BREAKERS

Despite the fact that the choice of law system has been harshly criticized, for the most part we can expect to see more of the same for a long time to come. If states had an interest in change, it would have already begun to take place. After all, the problems are nothing new. The majority of states, however, are much more concerned in protecting their own interests than in developing a multi-state conflicts provision. Those states who do desire a different system are stuck in what scholars describe as a prisoners dilemma.<sup>164</sup> On the federal level, the courts have far too much of a caseload to worry about pronouncing a uniform standard in an area as controversial as choice of law. In addition, even if the Supreme Court were to decide it wanted to promulgate a choice of law provision, getting a majority of justices to agree on its content could be a nightmare. Finally, Choice of Law is just not a priority on Capitol Hill. This is the type of issue that most politicians would rather leave alone — one that brings very few political benefits, while exposing some obvious risks. Finally, no one knows for sure what effect a uniform choice of law provision would have on our legal system, and there is a fear of the unknown which provides resistance against change.

Those hoping to see the states create a uniform choice of law structure on their own will probably never see their dream come alive. Currently, the *Second Restatement*, which was once thought to be the answer, is followed by only 46% of the states. Getting the highest court of fifty different states to apply the same choice of law provision without a national mandate simply is not a feasible alternative. Each state views itself as an independent sovereign; even though the fifty states are regarded as co-equals, subordinating one state's law to that of another violates the prem-

---

<sup>164</sup> See *infra* note 169.

ise of sovereign equality.<sup>165</sup> In addition, only one state, Louisiana (in 1992), has passed legislation expressing state policy on a choice of law issue (conflict in tort laws).<sup>166</sup> Otherwise, state legislatures have left this domain to the courts. As for the people, "the lack of theoretical consensus, propensity for wholesale rule revision, and general confusion that pervade this area of law make it unlikely that those (state choice of law) policies are understood or embraced as high order state concerns by the states or their respective citizens."<sup>167</sup>

In many areas of substantive law, states are more interested in protecting their own interests than in honoring multistate concerns. For example, in the area of torts, "the differences from one state to another are not mere matters of detail, but affect basic issues of duty, standard of care, causation, affirmative defenses, and recoverable damages . . . [all] high order policy decisions."<sup>168</sup> State courts face the political reality that if they won't protect these interests, no one will.

When the states get involved in multistate considerations, they are often stuck in a prisoner's dilemma.<sup>169</sup>

---

<sup>165</sup> Kramer, *supra* note 9, at 2142-43.

<sup>166</sup> Louisiana, a civil-law state, has adopted a new statutory scheme dealing with choice of law in tort cases. See Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677 (1992).

<sup>167</sup> Reavley & Wesevich, *supra* note 4, at 20-21.

<sup>168</sup> Sedler & Twerski, *supra* note 135, at 629.

<sup>169</sup> The "prisoners dilemma" involves the following hypothetical situation:

X and Y are arrested on suspicion of having committed a serious offense. Without a confession, the District Attorney has only enough evidence to obtain a conviction on a lesser included offense. The DA therefore puts X and Y in separate cells and offers each a deal whereby if one confesses and the other does not, the confessor will get three months imprisonment while the silent partner gets five years; if both confess, they will both get two years; and if neither confesses, they will both get six months.

If X and Y could coordinate their responses to the DA, they would probably agree that neither of them should confess. To be sure, each one might want to hold out for the option in which he confesses and his compatriot does not, since this gives the confessing prisoner the shortest possible sentence. This might even happen if there was a great disparity in bargaining power or if a side-deal could be arranged. (For example, if X can have Y killed, X can give Y a choice



Since they do not know how other jurisdictions will respond, the states must prepare a strategy: they may either follow their own law (and sacrifice multistate considerations altogether), apply the law of another jurisdiction (and run the risk that the other forum does not), or adopt some type of proposed choice of law provision (and hope that other states reciprocate). Larry Kramer states that "the states could appoint representatives to negotiate a cooperative choice of law solution, but they have not done so. Instead, the states have left the choice of strategies to the judges."<sup>170</sup> Knowing the risk of getting burned all too well, many judges will take the safe way out — and nothing will change.

As for the federal judiciary, there is simply not enough time in the day to worry about a uniform choice of law provision. The parameters of any new law are normally tested through litigation, and the courts have no desire to add to their existing monumental caseloads. If such a standard were to be adopted, it would probably have to come from the Supreme Court. This will not occur. The Court has expressed no interest in getting involved in this

---

between death and five years.) But absent such circumstances, and if there is any willingness to cooperate, the obvious solution is for neither X nor Y to confess.

Game theory nonetheless posits that if X and Y do not consult, they will both confess and go to jail for two years. Consider the situation from X's perspective: If Y confesses and X remains silent, X goes to jail for five years; by confessing, X can lower this sentence to two years. If Y does not confess and X remains silent, X goes to jail for only six months; but if X takes advantage of Y's silence and confesses, X can reduce this sentence to three months. X is better off confessing no matter what Y does. Moreover, because the situation is symmetrical, Y faces the same array of possible outcomes. Therefore X and Y will confess.

Interestingly, because X and Y acted rationally, both are worse off: if both had cooperated by remaining silent, they would have gotten only six months. But without the opportunity to negotiate, neither can afford to take this risk. Because each is choosing only his own strategy, he must confess or run the risk that the other player will (in which case he goes to jail for five years). This risk makes defection rational under the circumstances.

Kramer, *supra* note 39, at 341.

<sup>170</sup> *Id.*

area.<sup>171</sup> This is possibly due in part to the fact that a majority of the bench could never agree on one overriding choice of law provision.

Congress has virtually no incentive to enter into the choice of law fray. As the Multiparty, Multiforum Act shows, even a Bill which would apply to a very small, but very important area of law, can sit on the table for years. Most people simply don't care about the politics of choice of law. Even corporate defendants, who are often victims of the system, have bigger cards on their political table. As Douglas Laycock stated:

Congress may be expected to leave the (choice of law) problem to common law because there are no votes to be gained by resolving it. The victims of discriminatory choice of law decisions are a dispersed and anonymous minority, many of them victimized only once, incapable of organizing as a political force. The victims who could organize, such as insurance companies and product manufacturers, are more concerned with other political agendas.<sup>172</sup>

The only pressure Congress (especially the Senate) has acknowledged is that applied by groups of attorneys, who are major contributors to Congressional re-election treasuries. Therefore, it makes sense that a Congressman would not want to risk losing monetary support on a "no glamour" piece of legislation. Even in areas on the "cutting edge" such as products liability, Congress has been unable to reach a solution, even though members of citizen groups and the news media have been breathing down their necks. Given the current political climate, Congress believes it has far more important issues to deal with than choice of law, and is probably right in that determination.

---

<sup>171</sup> See Laycock, *supra* note 109, at 331-34.

<sup>172</sup> *Id.* at 334 (citing Bruce B. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) arguing that dispersed and anonymous minorities lack the ability to organize as an interest group or voting block, an ability that gives discrete and insular minorities power disproportionate to their numbers).

Finally, even though scholars have written mountains of critical commentary on the current choice of law system, choice of law seems, at a minimum, understandable and workable. This is not the case with the possible repercussions of any new uniform provision. As Patrick Bradley said: "No system is perfect, but it could be worse. Although the simplification of choice of law is a worthwhile goal, the result could possibly be more complex. It's like the monster in the closet: if you leave it alone, you'll be O.K.; if you mess with it, you never know. . . ." <sup>173</sup> The monster would probably be spending a great deal of time in the court system.

### CONCLUSION: STICKING WITH THE STATUS QUO — NO DEAL!

The choice of law system in the United States is far from ideal. Each state seems to apply a different standard in a different fashion. This leads to claims of forum shopping, unpredictability, uncertainty, bias toward state interests, and nonuniformity — just to name a few of the problems. As a result, scholars and practitioners have called for a change to a uniform choice of law provision, on the state or federal level. For various reasons, such a solution does not appear on the horizon. In the mass tort context, Linda S. Mullenix admits that "such is the nature of the task that even perennial optimists are skeptical whether law reformers will be able to achieve a consensus solution to this choice of law problem in the near future." <sup>174</sup> The same can be said for choice of law in general.

What's behind door number two? We don't know. The topic is one that will undoubtedly be addressed for the months and years to come. As bad as the system suppos-

---

<sup>173</sup> Bradley interview, *supra* note 43. This discussion with Bradley initially brought the "Let's Make a Deal" metaphor to mind. He talks as if many attorneys are afraid to find out what a uniform provision would be like, because it could even be worse than what we have today. *Id.*

<sup>174</sup> Mullenix, *supra* note 4, at 1627.

edly is, our legislative and judicial decisionmakers would rather cling to it than venture into the unknown. For now, the “chickens” are just going to hold on to what they’ve got. This leaves us wondering what’s out there: the big deal of the day, or just another zonk.



## **Comments**

